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VIA EMAIL & REGULAR MAIL
Eric Schaaf, Esq.
Regional Counsel
U.S. Environmental Protection Agency, Region 2
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Dear Eric:

As you are aware, we represent Charles Pufahl, as a former partner of Northern State Realty Co. ("NSR"), Adchem Corp. ("Adchem"), and Lincoln Processing Corp., ("Lincoln"), each of which EPA has named in letters as PRPs at the New Cassel/Hicksville Groundwater Contamination Superfund Site (the "Site").

We had received communications from your staff that they were working to resolve the issue raised in my letter of September 25, 2014. Now, six weeks later, there is still no resolution; I would have thought the Region would have proceeded with greater dispatch given the difficulty caused by the Region's specific allegations in letters that are now part of the administrative record, and the circumstances leading thereto.

Instead, our clients recently received another letter from your Assistant Regional Counsel Sharon Kivowitz, in which she outlines EPA's negotiating position in advance of the upcoming November 12th meeting with the PRP Group for the Site. Ms. Kivowitz's letter is directed not only to Lincoln and Adchem, but also includes Mr. Pufahl as an addressee. We note as well that the letter makes no mention of the October 22nd decision in the private cost-recovery action captioned Next Millennium Realty, LLC v. Adchem Corp. et al., 03-cv-5985 (E.D.N.Y.) ("Next Millennium"). This decision – available at 2014 WL 5425488, and previously provided to you via email – holds that NSR did not have sufficient indicia of ownership under its lease of the 89 Frost Street Site ("89 Frost") to be an "owner" of 89 Frost for CERCLA purposes (the only theory of liability alleged against NSR and Mr. Pufahl) under the controlling precedent of Commander Oil v. Barlo, 215 F.3d 321, 328 (2d Cir. 2000).

EPA's July 22, 2014 letter naming Mr. Pufahl as a PRP relied entirely on the allegation that he, "as a general partner of [NSR]...had indicia of ownership/control under its lease

purchase agreement for the property that establish [sic] liability as an owner under…CERCLA." Since this allegation has been considered and rejected by a judge of the same court that would hear any enforcement action relating to the Site, we again ask that EPA cease naming Mr. Pufahl as a PRP in future communications to the PRP Group, and that you withdraw your PRP letter against Mr. Pufahl.

We also reiterate that EPA's notice letter to Adchem is without any reasonable foundation and is tainted by the *ex parte* and erroneous information provided to EPA. It is undisputed, even by our adversaries in Next Millennium, that Adchem never used any contaminant of concern, never owned or leased any suspect site, and never conducted any manufacturing activities at any such site. Nevertheless, EPA notified Adchem of its potential liability "as an owner or operator" of a facility at the Site at the time of disposal of hazardous substances.

The only possible basis for PRP status for Adchem is a veil-piercing theory. Indeed, this theory[1] was articulated by the Next Millennium Plaintiffs in their June 18, 2014 *ex parte* memorandum to EPA, which we obtained via a FOIA request. However, similar applications of this theory have been repeatedly rejected by the Second Circuit in similar factual circumstances, most recently in September 11th decision in New York State Electric and Gas Corp. v. FirstEnergy Corp. ("NYSEG").[2]

NYSEG reaffirms the black-letter rule that, to reach Adchem via veil-piercing, EPA would have to prove that (i) Adchem improperly dominated and controlled another entity that released PCE at 89 Frost; and that (ii) the domination caused the PCE release at 89 Frost.[3] Significantly, even after years of discovery, our adversary could offer no evidence supporting the causation prong of the veil-piercing inquiry beyond a conclusory and unsupported allegation that "PCE pollution [was] inherent in dry cleaning operations utilized at the relevant time."[4] This contention is contrary to a Second Circuit case finding that the plaintiff had failed to prove that PCE contamination resulted from the defendants' operation of a dry cleaning machine between 1962 and 1978,[5] as well as undisputed expert testimony in Next Millennium that the type of small dry cleaning machine allegedly operated by Lincoln would not have released PCE to the subsurface in the course of typical operations. It also fails to provide any evidence that domination or control could have caused any release of PCE via any aspect of Lincoln's operations apart from the alleged operation of a small dry-cleaning machine for quality control.

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[1] The Next Millennium plaintiffs provided EPA with a June 18, 2014 legal memorandum suggesting that Adchem might also be liable on a joint venture or successorship theory. However, on the previous day the same parties filed summary judgment briefs that did abandoned both of those theories, tacitly admitting that they are without basis.
[2] 766 F.3d 212 (2d Cir. 2014)
[3] Id. at 229; Bedford Affiliates v. Sills, 156 F.3d 416, 431-32 (2d Cir. 1998), *overruled in part on other grounds by* W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 89-90 (2d Cir. 2009).
[4] Pls.' Opp'n at 10.
[5] Bedford Affiliates, 156 F.3d at 429.

Similarly, EPA cannot establish the domination required for veil-piercing. Our Next Millennium adversary relied on vague allegations of improper connections between the Pufahl family and their closely-held entities, which allegations defy or are contradicted by overwhelming evidence to the contrary. For example, the Plaintiffs alleged that Adchem and Lincoln "routinely shared employees"; however, the testimony they rely on for this allegation (which we provided to the Region and cited in our summary judgment motion on this issue) establishes only that Lincoln employees worked for Lincoln at different Lincoln locations during their employment, and that during part of that time period Adchem had separate operations in one of those locations. Similarly, they allege that transactions between Adchem and Lincoln were not at arm's length, because John Pufahl negotiated the price of Adchem's adhesives with his uncles; they neglected to inform EPA that at the time, John Pufahl was an employee and officer of only Adchem, and his uncles were acting as officers of Lincoln. This stands in stark contrast to the finding in NYSEG.[6] Of course, even if all of the Pufahls had been employees (or officers or directors) of both Adchem and Lincoln at the time (which they were not), their mere participation in transactions between the two companies would not change the arm's-length nature of those transactions. As the Supreme Court has acknowledged, it is a "'well established principle [of corporate law] that directors and officers holding positions with [two corporations] can and do 'changes hats' to represent the two corporations separately, despite their common ownership.'"[7]

As the NYSEG decision makes plain, the corporate domination needed for veil-piercing is simply not present here, even taking the Next Millennium plaintiffs' exaggerated positions at face value. For example, veil-piercing in NYSEG was supported by factual findings that a dominant shareholder "freely transferred funds in and out of [the parent corporation] and its subsidiaries", that "[the parent] and its affiliates 'siphon[ed]' off funds from the [subsidiaries] and deposited them into the 'pockets of the individuals and corporations engaged in milking the [subsidiaries] through the device of servicing and management contracts," and that subsidiaries were "charged...a management fee of 2.5 percent of their gross revenues" by a company that provided no management services to them. By contrast, the Next Millennium plaintiffs' allegations of financial impropriety are limited to statements that Lincoln and Adchem used the same accounting firm, and that at times Lincoln office employees were responsible for replenishing Adchem's petty cash fund (from Adchem's account). These allegations are, of course, insufficient to show domination, much less domination leading to the contamination at the Site.

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[6] 766 F.3d at 226 (finding that "[the parent] and its subsidiaries did not deal at arms length, *as no one represented NYSEG or any of the other subsidiaries in the service contract negotiations*.") (emphasis added).

[7] United States v. Bestfoods, 524 U.S. 51, 69 (1998) (quoting Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 779 (5th Cir. 1997)).

In light of these circumstances, EPA cannot and should not maintain the PRP allegation against Adchem. If EPA continues to maintain the allegation, the PRP letter should be revised to indicate that Adchem could only be liable under a veil-piercing or single-enterprise theory.

Finally, EPA's PRP letter to Lincoln contains a specific allegation that Lincoln "utilized PCE and TCE in its processes which were released at [89 Frost]." As with the allegations against Adchem, this specific allegation is obviously based on *ex parte* (and incorrect) information provided by our Next Millennium adversary. Discovery in Next Millennium has revealed no admissible evidence that Lincoln ever used TCE in any of its processes at any location, and the evidence that Lincoln used PCE in its processes at 89 Frost is limited to the disputed allegation that Lincoln installed a small dry-cleaning machine for quality-control purposes towards the end of its tenure at 89 Frost.[8] As stated above, undisputed expert testimony in Next Millennium establishes that the ordinary operation of this machine would not have released any PCE to the subsurface at 89 Frost, consistent with Second Circuit case law on CERCLA liability arising out of dry cleaning operations.[9]

We again submit that it is an abuse of EPA's discretion to refuse to correct or withdraw its accusatory letters against our clients. EPA has previously suggested that it would await a ruling on our motions in Next Millennium, but has refused to withdraw its PRP letter against Mr. Pufahl even following a ruling that he is not a PRP.

We acknowledge that should EPA withdraw or correct its PRP notices, the agency would not be precluded issuing new or revised PRP letters against our clients if Magistrate Lindsay's ruling on our second summary judgment motion, or other factors, suggest that such allegations would be justified and appropriate.

We would like to discuss this matter with you at your earliest convenience, and thank you for your consideration.

Respectfully,

Dan Riesel

Daniel Riesel

[8] Our Next Millennium adversary submitted, on an *ex parte* basis, affidavits of former Lincoln employees that state a "strong solvent" was used to clean Lincoln equipment and washed into floor drains; however, deposition testimony by those employees (which we provided to EPA) states that they were referring to MEK, not PCE, and that PCE was never used to clean Lincoln's equipment. Our Next Millennium adversary did not provide this testimony to EPA.

[9] Bedford Affiliates, 156 F.3d at 429.

Cc: Sharon Kivowitz, Esq. (EPA)
Thomas Lieber, Esq., EPA Office of Regional Counsel